

File
16-8



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Investigation on Motion of the Department of
Natural Resources of an Alleged Unlawful
Construction and Maintenance of a Floating Wet
Boathouse on the Bed of Little Star Lake, Town of
Manitowish Waters, Vilas County, Wisconsin, by
Benjamin C. Roemer

Case No 3-NO-98-64028

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Department of Natural Resources (Department) alleges that Benjamin Roemer has constructed and is maintaining a structure which it characterizes as a "floating wet boathouse" or, alternatively, as a fixed houseboat on the bed of Little Star Lake in Vilas County, Wisconsin. The Department alleges this structure has been constructed and maintained in violation of sec. 30.121, Stats., and Chapter NR 325, Wis Adm. Code, and ordered a public hearing pursuant to sec. 30.03(4)(a), Stats.

Pursuant to due notice the Division of Hearings and Appeals conducted a public hearing on May 27, 1999, in Manitowish Waters, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presiding. The parties filed written arguments after the hearing. The last brief was received on July 13, 1999.

In accordance with secs. 227.42 and 227.53(1)(c), Stats, the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael Scott
P. O. Box 7921
Madison, WI 53707-7921

Benjamin Roemer, by

Attorney John L. O'Brien
P. O. Box 639
Eagle River, WI 54521

FINDINGS OF FACT

1 Benjamin Roemer owns real property with a street address of 53 Powell Marsh Road, Manitowish Waters, Wisconsin and with a legal description in Section 16, Township 42 North, Range 5 East, Town of Manitowish Waters, Vilas County, Wisconsin. Mr Roemer's property is adjacent to Little Star Lake. Little Star Lake is navigable-in-fact.

2. In 1978, Mr. Roemer constructed a primarily wooden "Quonset hut-like" structure mounted on pontoon floats. The structure was open on one end and closed on the other. It was approximately 24 feet long and 24 feet wide. The structure had a catwalk on the three closed sides. The structure was kept on Little Star Lake adjacent to Mr. Roemer's property anchored by spudpoles. The structure had no floor inside the Quonset hut and inside the structure there was space to moor two boats. The structure could be navigated by placing two motor boats inside of it. Mr. Roemer occasionally navigated the structure on Little Star Lake and registered it as a boat with the Department of Natural Resources (Department).

3. By 1993, the Quonset hut-like structure had deteriorated and Mr. Roemer decided to rebuild or replace it. By letter dated May 14, 1993, Mr. Roemer advised the Department of his intentions and subsequently discussed his plan with Conservation Warden Supervisor Thomas Wrasse. The Department did not indicate it had any objection to Mr. Roemer's plans.

4. In 1996, Mr. Roemer began constructing a structure approximately 26 feet long by 26 feet wide. The structure has aluminum walls and an aluminum roof with a railing. It is closed on three sides with a double garage door on the fourth side. On the back (the side with the garage door) are two aluminum screen doors with four foot by four foot platforms extending out from the structure by each door. On the front of the structure is a catwalk with stairs leading to the roof. The structure is mounted on four pontoon boat style floats. Similar to the Quonset hut-like structure, this structure has space inside of it for mooring two boats.

Mr. Roemer keeps the structure on Little Star Lake adjacent to his property. The structure is anchored by ten spudpoles and is chained to two trees on shore. Mr. Roemer transferred the registration number from the Quonset hut-like structure to this structure. Mr. Roemer testified he used approximately ten percent of the material from the Quonset hut-like structure in the construction of this structure.

5. The structure is designed so that two motorboats can be placed inside of it and it can then be maneuvered on Little Star Lake. Mr. Roemer has taken the structure out onto Little Star Lake one time in late summer, 1998. The structure was navigated with a crew of five persons including two people operating the two motorboats which propel it. The persons operating the motorboats are unable to see where the structure is going but must follow directions from other crew members.

6. Although the structure is capable of storing boats, the structure constructed and maintained by Benjamin Roemer falls within the statutory definition of a boat. The structure as maintained by Mr. Roemer does constitute a fixed houseboat and as such is unlawful. The basis for this finding is set forth in the "Discussion" section below.

DISCUSSION

The Department argues that the structure constructed and maintained by Benjamin Roemer is a "floating wet boathouse" or alternatively a fixed boathouse. There is no statutory or administrative definition for "floating wet boathouse," however, "boathouse" is defined at sec. 30.01(1)(d) as "a structure used for the storage of a watercraft and associated materials which has one or more walls or sides." Additionally, "boathouse" is defined administratively at sec. NR 325.03(2), Wis. Adm. Code, as "a permanent structure used for the storage of watercrafts and associated materials and includes all structures which are totally enclosed, have roofs, have walls or any combination of structural parts." The structure constructed by Mr. Roemer is set on pontoons and as evidenced by the video (Exhibit 40) is capable of being navigated on Little Star Lake. Accordingly, the structure is not permanent and does not meet the definition of "boathouse" set forth at sec. NR 325.03(2), Wis. Adm. Code.

Additionally, Mr. Roemer presented uncontroverted testimony that the structure is not used for the storage of boats. Although, two boats were trapped in the structure over the winter of 1998-1999 when the water level on Little Star Lake was lowered without warning to Mr. Roemer, his testimony is that the purpose of the structure is not for the storage of boats. The Department has the burden of proof to show that this structure is a boathouse. The Department was unable to present evidence that the structure is used for the storage of boats and, accordingly, has not satisfied its burden to prove that this structure meets the definitions of boathouse set forth at sec. 30.01(1)(d), Stats., sec. NR 325.03(2), Wis. Adm. Code.

"Boat" is defined at sec. 30.50(2), Stats., as "every description of watercraft used or capable of being used as a means of transportation on water, except a seaplane on the water and a fishing raft." "Watercraft," in turn, is defined at sec. 30.01(7), Stats., as "any device used and designed for navigation on water." The structure constructed by Mr. Roemer does float and is capable of being maneuvered on water. It falls within the broad statutory definition of "boat." Although the Department witnesses argued that the structure is a boathouse, they conceded it does also meet the definition of a boat. In essence, Mr. Roemer has constructed a boat that is capable of storing other boats.

In the alternative, the Department argues that this structure is a "fixed boathouse." "Fixed boathouse" is defined at sec. 30.01(1)(r), Stats., as "a structure not actually used for navigation which extends beyond the ordinary high-water mark of a navigable waterway and is retained in place either by cables to the shoreline or by anchors or spudpoles attached to the bed of the waterway." This definition is repeated at sec. NR 325.03(5), Wis. Adm. Code. The phrase "not actually used for navigation" is defined at sec. NR 325.03(8), Wis. Adm. Code, as "that, while possibly floatable and maneuverable, the primary purpose is not navigation." The structure constructed by Mr. Roemer clearly is floatable and maneuverable on water as evidenced by the video he offered as evidence at the hearing. However, at the time of the hearing, the event recorded by the video was the only time this structure was taken out onto the lake. Otherwise, the structure is anchored below the ordinary highway mark of Little Star Lake adjacent to Mr.

Roemer's property by spudpoles and chained to two trees on shore. This manner of anchoring the structure falls squarely within the definition of a fixed houseboat.

I understand that at the time of the hearing, the structure was not completely finished; however, Mr. Roemer's own testimony was that he only intended to take the structure out onto the lake one, two, or three times a season. Also, although the structure is capable of being maneuvered on the water, it is clearly not practical for navigating. The structure is propelled by placing two motorboats inside of it. The persons operating those motorboats can not see where the structure is heading but must rely on directions from other crewmembers. If, as testified to by Mr. Roemer, the primary purpose of the structure is not for the storage of boats, it is not clear what its primary purpose is; however, it clearly is not navigation. Mr. Roemer has created a structure which, as a novelty, can be maneuvered on Little Star Lake, and falls within the definition of a boat; however, because it is retained in place by spudpoles and chains and its primary purpose is not navigation, it constitutes a "fixed houseboat." Pursuant to sec. 30.121(2), Stats., fixed houseboats may not be constructed or placed below the ordinary highwater mark of any navigable waterway after December 16, 1979. This structure was not placed until after that date and, accordingly, is unlawful.

The current structure was constructed to replace the Quonset hut-like structure Mr. Roemer had previously in place. That structure was registered as a boat; however, it appears that it would also have fallen within the definition of a fixed houseboat. The testimony at the hearing was that the Quonset hut-like structure was placed in 1978. Accordingly, pursuant to sec. 30.121(2), Stats., that structure, if it was a fixed houseboat, would have been lawful. Pursuant to sec. NR 325.06, Wis. Adm. Code, that structure could be repaired and maintained; however, repairs to the structure can not exceed fifty percent of the current value of the structure. Mr. Roemer is not arguing that the Quonset hut-like structure was a fixed houseboat and there is no evidence in the record of the value of that structure in 1996. However, Mr. Roemer's testimony is that only ten percent of the materials in the current structure came from the Quonset hut-like structure. It is inconceivable that based on that testimony that the current structure could be considered a repair of the Quonset hut-like structure which did not exceed fifty percent of the value of the Quonset hut-like structure.

Mr. Roemer also argues that even if the structure is found to be unlawful, the Department should be estopped from proceeding with this enforcement action because Department staff, including the current Secretary of the Department, visited his property and observed the Quonset hut-like structure without questioning its lawfulness and that Mr. Roemer wrote to the Department explaining his plans to replace the Quonset hut structure and received no objection from the Department regarding his repair/replacement plans for the structure.

With respect to the observation of the Quonset hut-like structure by Department staff, as discussed above, the Quonset hut-like structure could have been considered a fixed houseboat and would have been lawful since it apparently was in place prior to December 1979. Therefore, neither the awareness of the existence of the structure by Department staff nor the fact that it was registered by the Department as a boat should prevent the Department from commencing this enforcement action with respect to the current structure.

With respect to the letter Mr Roemer wrote to the Department concerning his plans for replacement of the Quonset hut-like structure, the Department does dispute whether or not it raised any objection to his plans. However, even assuming that the Department did not clearly raise any objection with Mr. Roemer regarding his plans to replace the Quonset hut-like structure, estoppel can not be used against the Department as a defense to this enforcement action. The principle is well established that estoppel is not available against governmental bodies when the governmental action involves a police power. In its opinion in Department of Revenue v. Moebius Printing Co., 89 Wis.2d 610, 279 N.W.2d 213 (1979), the Wisconsin Supreme Court commented:

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. State v. Chippewa Cable Co., 21 Wis.2d 598, 608, 609, 124 N.W.2d 616 (1963); Park Bldg. Corp. v. Ind. Comm., 9 Wis.2d 78, 87, 88, 100 N.W.2d 571 (1960); Town of Richmond v. Murdock, 70 Wis.2d 642, 653, 654, 235 N.W.2d 497 (1975); McKenna v. State Highway Comm., 28 Wis.2d 179, 186, 135 N.W.2d 827 (1965); Milwaukee v. Milwaukee Amusement, Inc., 22 Wis.2d 240, 252-53, 125 N.W.2d 625 (1964).

89 Wis.2d 610, 639

The Department's regulation under Ch. 30, Stats., involves a public interest in navigable waterways and as such is considered an application of police power. In its opinion in Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), the Wisconsin Supreme Court found:

Wisconsin has long held that laws and regulations to prevent pollution and to protect the waters of this state from degradation are valid police-power enactments State ex rel. Martin v. Juneau (1941), 238 Wis. 564, 300 N.W. 187; State ex rel. La Follette v. Reuter (1967), 33 Wis.2d 384, 147 N.W.2d 304; Reuter v. Department of Natural Resources (1969), 43 Wis.2d 272, 168 N.W.2d 860. The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. Muench v. Public Service Comm. (1952), 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40.

56 Wis.2d 7, at 18.

CONCLUSIONS OF LAW

1 The structure described in the Findings of Fact constitutes a fixed boathouse within the meaning of sec. 30.01(1r), Stats.

2. Pursuant to sec. 30.121(2), no person may place a fixed boathouse below the ordinary highwater mark of a navigable waterway after December 16, 1979. The current structure was placed in 1998. Nor does the current structure constitute a repair of the previous

Quonset hut-like structure. The structure constructed and maintained by Benjamin Roemer and described in the Findings of Fact is unlawful.

3. Pursuant to sec. 30.294, Stats., as a violation of sec 30.121, Stats., this structure constitutes a public nuisance.

4. The Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The structure placed by Benjamin Roemer and described in the above Findings of Fact is an unlawful fixed houseboat and is hereby prohibited from being placed below the ordinary highwater mark of Little Star Lake. If the structure is still placed below the ordinary highwater mark of Little Star Lake it shall be removed within 45 days of the date of this order.

Dated at Madison, Wisconsin on October 8, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 264-9885

By Mark Kaiser
MARK J KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision

1 Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec 227 49, Stats Rehearing may only be granted for those reasons set out in sec. 227 49(3), Stats A petition under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats

3 Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec 227 52 and 227 53, Stats Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227 52 and 227.53, Stats., to insure strict compliance with all its requirements.